IN THE

United States Court of Appeals

For the Ninth Circuit

GILA RIVER RANCH, INC., a corporation, and RUSSELL BADLEY, and CELESTE BADLEY, Appellants, vs. UNITED STATES OF AMERICA, Appellee.	No. 20643
GILA RIVER RANCH, INC., a corporation, Appellant, vs. UNITED STATES OF AMERICA, Appellee.	No. 20644

Appeal from the United States District Court for the District of Arizona

PETITION FOR REHEARING OF GILA RIVER RANCH, INC.

SNELL & WILMER
Attorneys for Appellant
Gila River Ranch, Inc.

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Appellant, Gila River Ranch, Inc., respectfully petitions that a rehearing be granted for the reasons:

The statutory appellate jurisdiction of this Court is limited to review of orders and judgments from which an appeal is taken.

Donovan v. Esso Shipping Company, 259 F.2d 65, (3rd Cir. 1958)

Carter v. Powell, 104 F.2d 428 (5th Cir. 1939), cert.den. 308 U.S. 611

Gannon v. American Airlines, Inc., 251 F.2d 476 (10th Cir. 1957)

No appeal has ever been taken by the United States from the Order Denying the Government's Motion for a New Trial or from the judgment entered on the jury's verdict.

Accepting, arguendo, that the District Judge might correct—as a mistake—his approval of an unambiguous remittitur, it does not follow that such correction lifts the barrier which the failure of the United States to appeal has raised to any material change in the judgment of February 1, 1965.

Gila respectfully asserts that no amount of correction or change in the Order approving the remittitur can amount to either revocation of the Order Denying a New Trial or to an enlargement of the time for appeal from the judgment of February 1, 1965 and the Order Denying a New Trial with reference to said judgment.

Gila's appeal was from the void judgment of November 18, 1965; that is the only matter with respect to which this Court's jurisdiction has been invoked.

Unless, therefore, it be the law that an appeal from a specific judgment opens the record for a review by a Court of Appeals of all proceedings had in the cause below including a judgment and order denying a new trial with respect thereto which has not been appealed from, this Petition is meritorious.

We respectfully call the Court's attention to the fact that none of the cases relied upon as empowering a District Judge to hold a rehearing and change his decision deal with the jurisdiction of such a judge following a jury trial. Gila specifically points to the fact that Rule 58(b) only permits this in a case tried to the Court.

The Opinion says in effect: (a) Judge Powell made a "mistake" when he approved the remittitur July 15, 1965 which could be corrected under Rule 60(b)1 within the time allowed for appeal; (b) the Government's Motion for Judgment on the Remittitur constituted such a timely motion, hence Judge Powell could correct his Order of July 15th by, in effect vacating it, and accepting a "satisfactory" remittitur from Gila. The Opinion recognizes that such a proceeding under Rule 60(b) is an "independent" proceeding which does not toll or extend the time for appeal. Yet the Court in effect holds that it provides a procedure which permits the entry of a second judgment from which an appeal can be taken thereby in effect appealing from a trial judgment with respect to which the time for appeal has long sinced passed. We respectfully assert that this conclusion is unsound.

We respectfully assert that if the Government's "Motion for Judgment on Remittitur" be treated as a motion to correct a mistake under Rule 60(b) these conclusions logically must be reached

(a) The District Judge then knew his order of July 15, 1965 had been rendered by a mistake since Gila was vigorously challenging the right of the District Judge to in effect enter a second judgment thereby correcting the mistaken order of July 15, 1965.

(b) The Government was equally well advised as to the position of Gila.

(c) The Government, instead of urging that the District Judge vacate his order of July 15, 1965 as mistakenly entered, actively urged that this infringement of the constitutional rights of Gila be ignored by ratifying the order of July 15, 1965, through entry of the second judgment.

This the District Judge did.

If in fact the Motion for Judgment Upon Remittitur was an application by the United States to correct the mistaken order

of July 15, 1965, *the United States should have appealed to this Court when the District Judge, in effect, refused to correct this mistake,* then clear to all, but instead ratified it by the entry of the second judgment.

THE BADLEY APPEAL

We respectfully call the Court's attention to the fact the Badleys were parties to the trial (R.T. 117, Entry of Nov. 18, 1964); that the judgments did not run in favor of any named parties and that the purpose of the assignment of the proceeds was a matter of convenience to the parties to simplify handling of the funds. We respectfully assert that this is a matter which should not be adjudicated by this Court since manifestly there has been no hearing on the matter and no "case or controversy" posed. Certainly the District Court did not have a "case or controversy" in the constitutional sense for adjudication and if the District Court had no jurisdiction this Court has none.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is in my judgment well founded and that it is not interposed for delay.

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Mark Wilmer